COVID-19
Emergency Legal Preparedness Primer
As of May 12, 2020
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Contents

- COVID-19 Epi Snapshot
- Emergency Legal Preparedness/Response/Recovery
  Federal | State | Tribal | Local
- Public Health Emergency Powers
- Constitutional & Other Challenges
- Additional Resources
- Questions/comments
Transmission

- Transmissible person-to-person with potential infectivity rate exceeding annual influenza.
- Asymptomatic persons may clearly infect others.

Symptoms

- Respiratory symptoms, fever, cough, breathing difficulties, chills, muscle pains, headache, sore throat & loss of smell/taste
- In severe cases infection can cause pneumonia, respiratory issues, kidney failure & death.

Vaccines & Treatment

- There are no effective treatments or vaccines although several possible options are under close review or early assessments.
People Who Are at Higher Risk for Severe Illness

Underlying health condition/Risk factor for severe outcomes from respiratory infection (% with condition)
• One or more conditions (37.6%)
• Diabetes (10.9%)
• Chronic lung disease (9.2%)
• Cardiovascular disease (9.2%)

COVID-19 Confirmed Cases & Deaths

Global Cases  4.21 million | Deaths: 287,158
U.S. Cases      1.38 million | Deaths: 81,539
U.S. Stats   32% all cases | 28% all deaths

Unprecedented Emergency Declarations

Public health authorities and powers vary depending on the type of emergency declared at every level of government.

<table>
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<th>International</th>
<th>WHO Public Health Emergency of Int’l Concern January 30, 2020</th>
<th>Emergency Declarations by Foreign Governments Ongoing</th>
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<tr>
<td>Local</td>
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<td>Public Health Emergency</td>
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</table>

Public health authorities and powers vary depending on the type of emergency declared at every level of government.
Federal Emergencies/Invocations

- **HHS Public Health Emergency**
  - **Jan. 31**

- **HHS PREP Act Declaration**
  - **Feb. 4**

- **Stafford Act Emergency**
  - **Mar. 13**

- **National Emergencies Act**
  - **Mar. 13**

- **Defense Production Act**
  - **Mar. 20**
Jan. 31: HHS Sec. Alex Azar declares national public health emergency effective as of Jan. 27

- Encourages interjurisdictional coordination
- Allows waivers of specific federal laws
- Authorizes real-time countermeasures through emergency use authorizations
- Supports social distancing measures

Apr. 21: Sec. Alex Azar renews PHE declaration for an additional 90 days
Mar. 13: President Trump declares dual emergencies via the National Emergencies Act and § 501(b) of the Stafford Act authorizing:

- Access to FEMA’s Disaster Relief Fund and reimbursement for eligible emergency protective response measures.
- Waivers under SSA § 1135 of select Medicare, Medicaid, S-CHIP, HIPAA Privacy Rule requirements
- Additional types of federal assistance to states & localities
Select Congressional Responses

3/14   Families First Coronavirus Response Act provides paid sick/quarantine time & other benefits

3/27   Congress passes the CARES Act, the largest economic stimulus package in history

4/23   Congress passes $484 billion relief plan to support small businesses, health care & COVID testing

5/08   House introduces bill to increase support for SCHIP during the COVID-19 emergency

5/08   House introduces bill to study racial and ethnic disparities tied to COVID.
Mar. 18: Families First Coronavirus Response Act:

- Requires private health plans to provide no cost coverage for COVID-19 diagnostic tests
- Temporarily increases federal portion of Medicaid
- Releases millions $ in assistance to domestic nutrition assistance programs (e.g., SNAP, WIC)
- Requires certain employers to provide employees 14 days of paid sick leave
- Releases an additional $1 billion in FY2020 emergency grants for unemployment insurance benefits
Coronavirus Aid, Relief & Economic Security (CARES) Act

Mar. 27: Congress approves $2.2 trillion CARES Act (largest stimulus package in history):

• Hundreds of billions $ in emergency funding;
• Requires group health plans & insurance providers to cover testing, vaccines, and preventative services related to COVID-19 without cost sharing;
• Establishes a Ready Reserve Corps to ensure deployable workers are available for COVID-19 response;
• Provides explicit federal & state liability protections for volunteer HCWs assisting COVID-19 patients in good faith; and
• Authorizes disclosure of PHI to covered entities upon the one-time written consent of patient.

COVID-19 Additional Relief Package: Key Public Health Elements

Apr. 24: Congress approves $484 billion Paycheck Protection Program (PPP) & Healthcare Enhancement Act to:
- Fund hospitals & healthcare providers for COVID-19 expenses;
- Support COVID-19 testing & contact tracing efforts;
- Fund federal agencies to support COVID-19 testing;
- Require governors receiving funds to submit a COVID-19 testing plan with goals for 2020; and
- Require HHS Secretary to periodically report on COVID-19 testing, cases & deaths.

Congress has now approved $2.7 trillion in stimulus funds for COVID-19.

**Mar. 13:** HHS Sec. Azar issues § 1135 national waivers (retroactive effect on March 1) re:

- **EMTALA** sanctions for patient relocation purposes
- **HIPAA Privacy Rule** regulations (for limited duration)
- In-state **licensure requirements** for health care workers
- **Participation restrictions** on Medicare, Medicaid, & S-CHIP
- Medicare Advantage **payment limitations**
- **Stark Law** sanctions

**April 15:** CMS updates waivers for health care providers re:

- **Telemedicine provisions**, facilitating Medicare services
- **Patient rights** surrounding access to medical records, visitation & seclusion
- **Physical environments** to allow care in non-hospital settings during surge
COVID State & Select Tribal/Local Emergency Declarations

Click on the **date** of each state to view declarations

Link here for updates re: jurisdictional requests for FEMA disaster relief
Select State Emergency Powers
Explicitly Invoked by Declarations

**Note:** this table tracks select, express authorities referenced via state emergency declarations (link on each state acronym for access). *Additional emergency powers may be authorized under state law through which the declarations are issued.*

| Emergency Powers                                      | A | A | A | C | C | C | D | F | H | I | I | K | L | M | M | M | M | N | N | N | N | O | O | O | P | P | R | T | V | V | U | W | W |
| Altered Contracts | Procurements                   | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
| Emergency Plans | ICS                           | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
| Funding | Resource Allocation          | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
| Intrastate Coordination                                | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
| Isolation | Quarantine                   | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
| Licensure Reciprocity                                  | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
| Price Controls re: Gouging                            | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
| Surveillance | Reporting                  | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
| Testing | Screening | Treatment             | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
| Travel Restrictions                                  | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
| Waivers | Suspensions                  | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
**Legal Triage**: efforts of legal actors & others during declared emergencies to build a favorable legal environment by prioritizing issues & solutions facilitating legitimate public health responses.
Select Structural & Rights-based Constitutional Issues

- Separation of Powers
- Federalism
- Supremacy
- Preemption
- Judicial Deference
- Freedom of Expression
- Freedom of Assembly
- Freedom of Religion
- Due Process
- Right to Privacy
- Equal Protection
- Right to Travel
- Right to Bear Arms
- Cruel & Unusual Punishment
- Takings
Balancing Individual & Communal Interests

**Individual Interests**
- Privacy
- Religious Freedoms
- Due Process
- Equal Protection

**Communal Interests**
- Surveillance
- Treatment
- Isolation & Quarantine
- Curfews & Closures

Emergency Preparedness and Response
Emerging Legal Issues

- Testing/Screening/Treatment
- Surveillance & Reporting
- Emergency Powers - Triage
- Crisis Standards of Care
- Social Distancing Measures
- Liability & Insurance
- Privacy
Substantial change in usual healthcare operations and level of care due to a pervasive or catastrophic disaster.
Mar. 28: National Academies issues rapid expert consultation on CSC implementation

The National Academies of
SCIENCES • ENGINEERING • MEDICINE

March 28, 2020

Click on image to access

This rapid expert consultation responds to your March 25 request to provide a rationale for the implementation of crisis standards of care (CSC) in response to the COVID-19 outbreak. Also discussed are the broad principles and core elements of CSC planning and implementation. This discussion builds on a 10-year foundation of three seminal reports on CSC issued in 2009, 2012, and 2013 by the Institute of Medicine, which are described in Appendix A at the end of this document.

This document is meant to provide principles and guidance. It is neither appropriate nor feasible for us to detail actual choices and preferences that apply to specific situations, each of which depends on the exigencies of the epidemic relative to locally available facilities, equipment, personnel and other needed resources. Rather, this document describes the basis upon which to carry out such decision-making whenever it has to happen.
Select States’ COVID CSC Plans

Click on the **date** of each state to view CSC plans (where available)

- **COVID CSC Plan**

- **States with Plans**:
  - CA 3/1
  - OR 3/23
  - WA 3/16
  - NV 4/2
  - UT 4/15
  - CO 4/5
  - AZ 4/1
  - IL 4/16
  - MO 4/20
  - VA 3/18
  - PA 4/10
  - NY 4/17
  - MA 4/7
  - DC 4/2
  - ND 4/17
  - VT 4/17
  - WI 4/16
  - MN 4/16
  - IA 4/16
  - MO 4/20
  - AR 4/16
  - LA 4/16
  - MS 4/16
  - AL 4/16
  - GA 4/16
  - SC 4/16
  - FL 4/16
  - WY 4/16
  - CO 4/5
  - NM 4/1

- **Other States**:
  - AK - Alaska
  - HI - Hawaii
  - PR - (Puerto Rico)
  - VI - (Virgin Islands)
CSC Legal Issues

Practical, Ethical, and Legal Challenges Underlying Crisis Standards of Care

James G. Hodge, Jr., Dan Hanfling, and Tia P. Powell

- Allocation
- Patient’s Rights
- Reimbursement
- Licensure
- Scope of Practice
- Civil Rights
- Duty to Care
- Uniformity
- Liability
Emergency Liability Protections - Health Practitioners & Entities

Despite risks, many legal liability protections apply in routine events & declared emergencies, especially concerning health care volunteers, workers, and entities.
Social Distancing Measures

- Control modes of transportation
- Increase distance among workers
- Discard schools
- Restrict public gatherings
- Shelter-in-place/Lockdown
- Curfew
- Evacuation
- Isolation & quarantine

Other measures include:
- Isolation & quarantine
- Lockdown
- Curfew
- Evacuation
- Shelter-in-place/Lockdown
- Restrict public gatherings
- Increase distance among workers
- Discard schools
Jan. 31: Trump Administration bans foreign national travel for those who have been in China w/in last 14 days and who pose a risk.

Feb. 29: Administration bans foreign national travel for those who have been in Iran, as well as travel warnings re: Italy, Japan & South Korea.

Mar. 11: President Trump institutes 30 day comprehensive travel ban for non-Americans arriving from EU, including U.K. & Ireland

Mar. 19: U.S. closes border with Canada & Mexico (through 5/20) to persons travelling for non-essential purposes (e.g. tourism).

Apr. 21: President Trump suspends limited immigration activities for 60 days.
U.S. Domestic Travel Restrictions

The New York Times

Mar. 26: “Governors Tell Outsiders From ‘Hot Zone’ to Stay Away as Virus Divides States”

- Florida Governor Ron DeSantis orders 14 day quarantine against anyone arriving from NY in prior 3 weeks
- Hawaii Governor David Ige recommends all travelers postpone trips for 30 days and imposes 14 day quarantine on arrivals
- Alaska Governor Mike Dunleavy orders anyone (including residents) arriving in state to self-quarantine for 14 days
State Shelter-In-Place or Stay Home Orders

Click on the date of each state to view the order

Note: data are based in substantial part on NYT (March 24, 2020)

Shelter-in-Place or Stay Home Orders – 42 states

Shelter-in-Place or Stay Home Orders – 3 partial states
## Select Components of State Shelter-in-Place & Stay Home Orders

<table>
<thead>
<tr>
<th>Component</th>
<th>CA</th>
<th>CT</th>
<th>DE</th>
<th>IL</th>
<th>LA</th>
<th>MA</th>
<th>MI</th>
<th>NY</th>
<th>OH</th>
<th>PA</th>
<th>OR</th>
<th>WV</th>
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<tr>
<td>Restricts Gatherings of “Any Number of People” Outside Household Unit</td>
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<td>Closes Non-Essential Businesses per <strong>CISA</strong></td>
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<td>Exempts Religious Establishments</td>
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<td>Bans Leaving Homes for Non-Essential Purposes</td>
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<td>No Non-Essential Travel</td>
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<td>Explicitly Addresses Homelessness</td>
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<td>Opportunities for Additional Exceptions</td>
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<td>Criminal Penalties</td>
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### "Essential" v. "Non-essential" Businesses

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<thead>
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<th>&quot;Non-essential Businesses&quot; Typically Include:</th>
<th>Exceptions Allowing for Continued Operations:</th>
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<td>Theaters</td>
<td>Religious institutions (KS)</td>
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<td>Food providers/grocers</td>
<td>Salons/Barbers</td>
<td>Gun shops (PA)</td>
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<tr>
<td>Food cultivation/agriculture</td>
<td>Gyms</td>
<td>Golf courses (AZ)</td>
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<tr>
<td>Social services/Daycare</td>
<td>Casinos</td>
<td>Construction (WA)</td>
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<tr>
<td>Veterinary clinics/pet stores</td>
<td>Concert venues</td>
<td>Federal critical infrastructure (HI)</td>
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<tr>
<td>Media</td>
<td>Shopping malls</td>
<td>Inventory companies (MI)</td>
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<tr>
<td>Pharmacies</td>
<td>Museums</td>
<td>Takeout restaurants (WV)</td>
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<tr>
<td>Convenience stores</td>
<td>Bowling alleys</td>
<td>Marijuana dispensaries (PA)</td>
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<tr>
<td>Sanitation</td>
<td>Racetracks</td>
<td>Liquor stores (NY)</td>
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<tr>
<td>Home/hardware stores</td>
<td>Sporting venues</td>
<td>Blood drives (AZ)</td>
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<tr>
<td>Educational institutions</td>
<td>Spas</td>
<td></td>
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<tr>
<td>Transportation/gas stations</td>
<td>Recreation centers</td>
<td></td>
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<tr>
<td>Warehousing/storage</td>
<td>Tattoo parlors</td>
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<tr>
<td>Post offices/shipping</td>
<td>Community pools</td>
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</table>
April 16: The White House releases guidelines for “Opening Up America Again,” a 3 phased approach for state/local officials to consider. States must first meet regional gating criteria:

- Downward trajectory of COVID illnesses reported w/in 14 days
- Downward trajectory of cases or positive tests w/in 14 days
- Hospitals must treat all patients outside CSC or implementation of a “robust reporting system”

April 21: U.S. Attorney General William Barr instructs U.S. Attorneys to litigate against states failing to comply with national re-opening strategies
Re-opening Phases

**Phase 1**
- Vulnerable individuals shelter-in-place
- All individuals should practice social distancing when in public and avoid socializing in groups <10
- Employers encourage telework and most businesses remain closed

**Phase 2**
- Resume non-essential travel
- Schools, gyms, and bars may re-open

**Phase 3**
- Vulnerable individuals may resume public interactions, with social distancing
- Large venues may reopen
### State Actions to Open America

<table>
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<tr>
<th>States relaying interests or plans to reopen</th>
<th>States allowing (or set to allow) specific open activities</th>
<th>States issuing Exec. Orders to reopen some businesses</th>
<th>States lifting “stay at home” orders partially or fully</th>
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</thead>
</table>
May 12: Pennsylvania Governor Tom Wolf threatens multiple counties attempting to open businesses in contravention of existing state-level stay-at-home orders with:

- withholding of discretionary federal funds to the counties;
- businesses loss of eligibility for liability insurance;
- businesses loss of liquor licenses and certificates of occupancy; and
- requirements that businesses pay unemployment benefits for employees choosing not to return.
April 15: In Michigan, thousands protested Governor Whitmer’s stay-at-home order at the state capitol in Lansing. Organized by the Michigan Conservative Coalition, protesters voiced concerns over harms to workers & businesses.

Additional protests have arisen in other states, including Arizona, California, Florida, Idaho, Maryland, Minnesota, North Carolina, Texas & Virginia

Assembly Limits

Government limits on assembly and speech are constitutional provided they are narrowly tailored to a substantial governmental interest & allow alternative channels for communication. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984)

- On what authority?
- By who specifically?
- At what governmental level?
- In what specific setting?
- For how long?
Feb. 16: CDC issues initial guidance intimating school mitigation could include possible closures

Mar. 13: Multiple states (e.g., OR, IL, MD, NM) determine to close schools for select periods of time followed by extensive closures in most states for all of Spring term

Apr. 22: Montana Governor Bullock allows local school districts to determine whether to re-open as soon as May 7

Apr. 27: President Trump suggests states should “seriously consider” reopening public schools despite safety concerns
Mar. 29: Curfew order across the Navajo Nation extends existing Stay at Home Order for the entire Navajo Nation. All persons, subject to some exceptions, must stay home from 8:00 p.m. - 5:00 a.m., 7 days a week.

May 5: Nearby Gallup, NM imposes strict confinement measures via use of “riot act” authorities allowed via NM Governor Michelle Lujan Grisham
Quarantine & Isolation

Quarantine
Separation from others of people exposed to a contagious condition prior to knowing if they may be ill or contagious

Isolation
Separation from others of people who are known to be infected, or capable of infecting others, with a contagious condition

For a listing of state-based quarantine and isolation statutes, see the link at the National Conference of State Legislatures
Jan. 31: CDC orders a 14-day quarantine of nearly 200 persons arriving at a U.S. military base in California 2 days prior on an evacuation flight from Wuhan, China.

Feb. 10: 4 additional flights amassing more than 800 Americans quarantined at 4 military bases.

Feb. 17: CDC quarantines 2 flights of over 300 Americans returning from the Diamond Princess cruise ship (in Yokohama, Japan) at Travis and Lackland Air Force bases.

Option A: Temporary Quarantine or Isolation w/out Judicial Notice via Written Directive

Option B: Quarantine or Isolation w/Judicial Notice

Agency petitions court for an order authorizing Q or I of an individual or group specifying:

- identity of the individual(s) or groups;
- premises subject to Q or I;
- date and time at which Q or I commences;
- suspected contagious disease;
- statement of compliance with conditions and principles; and
- statement of the basis upon which such intervention is justified.

Notice
- Hearing: held in proximity of petition, absent extraordinary circumstances.
- Order: if, by clear and convincing evidence, Q or I shown to be reasonably necessary to prevent or limit the transmission of a contagious or possibly contagious disease to others.
Q & I Best Practices

- Safe, hygienic premises
- Monitoring & care
- Basic necessities
- Means of communication
- Least restrictive means
- Termination
**March 3:** VP Pence: “Any American can be tested . . . subject to doctor’s orders.”

**March 21:** Some health officials restrict coronavirus testing to HCWs & hospitalized persons, *saying “the battle to contain the virus is lost [as we move] into a new phase of the pandemic response.”*

**April 11:** CMS issues guidance requiring insurers to cover diagnostic testing & related services with *no patient cost-sharing.*

**April 19:** Antibody tests key to reopening country are in high demand, yet tests’ *availability* and *inaccuracies* raise alarms.

**May 7:** AZ Gov. Ducey *withdraws access* by university researchers to select health data for in-state surveillance, then reverses decision.

Source: Adina Weisberg, J.D. Candidate, ASU Law
March 2020

COVID-19 & HIPAA Bulletin
Limited Waiver of HIPAA Sanctions and Penalties During a Nationwide Public Health Emergency

The Novel Coronavirus Disease (COVID-19) outbreak imposes additional challenges on health care providers. Often questions arise about the ability of entities covered by the HIPAA regulations to share information, including with friends and family, public health officials, and

COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities

Does the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule allow a covered entity to share the name or other identifying information of an individual who has been infected with, or exposed to, the virus SARS-CoV-2, or the disease caused by the virus, Coronavirus Disease 2019 (COVID-19), with law enforcement, paramedics, other first responders, and public health authorities without an individual’s authorization?

For additional expert analyses and guidance, contact Denise Chrysler, JD, and colleagues in our Network–MidStates Region at dchrysler@networkforphl.org
For More Information

Latest Resources
Federal Public Health Emergencies
Social Distancing Powers
Liability of Health Care Workers and Entities

Hospital Emergency Legal Preparedness
State and Local Declarations and Powers
Mental and Behavioral Health Preparedness

Model Emergency Laws
Emerging Threats Preparedness and Response
Crisis Standards of Care
Public Health Emergency Ethics

Access these and other Network materials here
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- Ask the Network concerning questions or comments relating to this information or ongoing COVID-19 legal preparedness & response efforts
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